

Application No. 10/615,627

Second Substitute Amendment Dated August 21, 2006

Reply to Office Action Dated February 1, 2006 and to Notices of Non-Compliant  
Amendment dated May 11, 2006 and July 3, 2006

REMARKS

Applicant's attorneys never received in the mail the Notice of Non-Compliant Amendment dated July 3, 2006. Applicant's undersigned attorney only became aware of the Notice on August 19, 2006, as a result of a visit to the Patent Office web site to determine the status of the prosecution of this application. Rather than file a petition to waive the late filing fee, to expedite matters a fee for a one month late response is being submitted.

In response to the Notice of Non-Compliant Amendment dated July 3, 2006, it is submitted that the status identifier of claim 101 is correct. Claim 101 was earlier amended to depend from claim 98 instead of claim 100, but through oversight "100" was not omitted from the claim. The claim has been corrected and is properly presented in this amendment.

The following comments are responsive to the Office Action dated February 1, 2006:

Paragraph 1 on page 1 of the specification has been amended as required by the Examiner in paragraph 6 of the Office Action under response.

Claims 64, 98 and 106 have been amended as suggested by the Examiner in paragraph 7 of the Action.

In claim 69 the strikethrough word "moving" that appeared in line 5 of the claim has been omitted as this word was previously deleted by the amendment filed January

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19, 2006. As there are no current amendments to claim 69, the claim status identifier “previously presented” is correct and has not been changed.

In claim 75 the strikethrough words “along an unenclosed length of the passage” that appeared immediately before the period “.” been omitted as these words were previously deleted by the amendment filed January 19, 2006. As there are no current amendments to claim 75, the claim status identifier “previously presented” is correct and has not been changed.

In claim 113 the strikethrough word “moving” that appeared in the last line of the claim has been omitted as this word was previously deleted by the amendment filed January 19, 2006. It is also noted that claim 113 has also been corrected to include the paragraph that recites the “flowing” step, which was inadvertently omitted from the July 18, 2005 amendment. The claim status identifier “previously presented” has not been changed and is believed to be correct, since there are no actual current amendments to the claim.

That leaves for consideration the rejection of the claims under 35 USC § 102, the basis for which resides in the Examiner’s finding that priority of the present application extends back to only August 10, 1999. The Examiner’s stated reason for finding a priority date of August 10, 1999 is that continuation-in-part application 09/371,425 (now US Patent 6,319,552), with a filing date of August 10, 1999, describes and claims subject matter not present in the next (immediately prior) case in the chain of priority, that being application 09/076,694 (now US Patent 5,968,270).

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Applicant acknowledges that successor CIP 09/371,425 describes subject matter not found in predecessor 09/076,694, as indeed it is expected to do, since it is a CIP. However, that is not the "priority" test of MPEP 2133.01, the first sentence of which states:

When applicant files a continuation-in-part whose claims are not supported by the parent application, the effective filing date is the filing date of the child CIP.

Thus, the test for priority is not whether the child CIP application describes subject matter not found in the parent application, but whether the claims of the child CIP are supported by the parent application.

For reasons to be discussed below, it will be seen that the claims of child CIP application 09/371,425 are, in fact, supported by predecessor parent application 09/076,694. In this connection, while not specifically identified by the Examiner, applicant assumes that the Examiner considers the "variable width outlet orifice" in the claims of child CIP application 09/371,425 as that which is not supported by parent application 09/076,694, and therefore as providing a basis for an August 10, 1999 priority date for the child CIP application.

Attached for the examiner's convenience is a copy of parent patent 5,968,270, which issued from parent 09/076,694 application. Also attached are a copy of an Affidavit of Dr. Michael Trefz, which was filed in the prosecution of the parent application, and of patent 5,603,767, which was Exhibit A for Dr. Trefz's affidavit. The claims of parent patent 5,968,270 call for a "variable width outlet orifice", and the

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Affidavit of Dr. Michael Trefz, which was accepted by the Examiner of the parent 09/076,694 application, states that the disclosure of the parent application teaches a "variable width outlet orifice", and therefore provides support for the recitation in the claims of a "variable width outlet orifice". Thus, parent application 09/076,694 provides support for the claims of child CIP application 09/371,425. In this connection, it is noted that while child CIP application added Fig. 7, which shows an alternate structure for adjusting outlet orifice width, other arrangements for adjusting outlet orifice width were already found in the structures of Figs. 2 and 4.

Consequently, if applicant is correct in assuming that it is the "variable width outlet orifice" in the claims of child CIP application 09/371,425 that the Examiner finds is not supported by parent application 09/076,694, then it is submitted that the Examiner made an erroneous finding and that child CIP application 09/371,425, and therefore the present application, are entitled to a priority date of September 11, 1992.

Accordingly, as the September 11, 1992 priority date of the present application is prior to the effective date of Ueberschar et al. patent 5,785,253 as a reference, it is requested that Ueberschar et al. be removed as a reference and that the 35 USC §102 rejection of the claims be withdrawn.

As all of the claims remaining in the application appear to be allowable, favorable reconsideration and early passage of the application to allowance are respectfully requested.

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Respectfully submitted,



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